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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RICHARD BELL, Petitioner.	2 CA-CR 2008-0121-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-68445

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Richard Bell

Douglas
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Richard Bell seeks review of the trial court's order denying the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., contending that his aggravated prison term violated the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We will not disturb a trial court's ruling absent a clear abuse

of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We see none here.

¶2 Bell was convicted of first-degree murder in 1993 after a jury trial. He obtained post-conviction relief and was subsequently tried and convicted of second-degree murder. The trial court sentenced Bell to an aggravated, twenty-year prison term in September 2000. This court affirmed the conviction and the prison sentence imposed. *State v. Bell*, No. 2 CA-CR 00-0390 (memorandum decision filed Nov. 27, 2001). He then sought post-conviction relief, raising claims of juror misconduct and ineffective assistance of counsel. The trial court denied relief, as did this court on review. *State v. Bell*, No. 2 CA-CR 2003-0308-PR (decision order filed June 18, 2004).

¶3 In a second petition for post-conviction relief filed in September 2005, Bell asked the trial court to modify his sentence based on *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court denied relief and dismissed the petition, finding Bell's conviction had become final before the Supreme Court decided *Blakely* in June 2004. We likewise denied relief, relying, in part, on *State v. Febles*, 210 Ariz. 589, 115 P.3d 629 (App. 2005). *See State v. Bell*, No. 2 CA-CR 2006-0062-PR (memorandum decision filed Sept. 7, 2006), ¶ 3. Our mandate issued on September 19, 2006, after Bell requested that we accelerate its issuance, and he chose not to file a motion for reconsideration or a petition for review to the supreme court.

¶4 Now Bell has again sought post-conviction relief based on *Apprendi*, asserting it applied to his case because it was decided in June 2000, about three months before he was

sentenced. He asserted below that, when the trial court denied his petition in 2005, it had decided only that *Blakely* was inapplicable but never addressed whether he was entitled to relief based on *Apprendi*. The trial court denied relief, noting correctly that, in *Febles*, Division One of this court held that *Blakely* "does not apply retroactively to cases on collateral review whether such cases were final before or after [*Apprendi*] . . . was decided." 210 Ariz. 589, ¶ 1, 115 P.3d 629, 631. Adding that Bell's case clearly was final when *Blakely* was decided, the trial court concluded he had failed to raise a colorable claim for relief. The court also denied his motion for reconsideration. On review, Bell reiterates his *Apprendi*-based claim. He asks that we consider the "important issues of law [related to the application of *Apprendi* and *Blakely* that] have been incorrectly decided and/or must be distinguished and clarified as guidance for the superior courts."

¶5 Bell has not persuaded us the trial court abused its discretion in denying relief. The court correctly rejected Bell's *Apprendi*-based claim, particularly in light of *Febles*. Our supreme court declined to review *Febles*, which we have followed, and we see no need to reexamine it. *See State v. Celaya*, 213 Ariz. 282, ¶ 6, 141 P.3d 762, 763 (App. 2006). We note, moreover, that—although the trial court addressed it on its merits—Bell's claim is precluded.[1] *See generally* Ariz. R. Crim. P. 32.2. The same claim was essentially raised and

[1]Bell challenged the aggravated prison term on appeal, but not based on *Apprendi*. Consequently, he forfeited the claim. Ariz. R. Crim. P. 32.2(a)(3); *see Bell*, No. 2 CA-CR 00-0390. However, appellate counsel cannot be faulted for failing to raise the issue because "*Apprendi* was widely understood then to apply only if the sentence imposed exceeded the statutory maximum." *Febles*, 210 Ariz. 589, ¶ 21, 115 P.2d at 636. Bell's prison term did not exceed the statutory maximum.

addressed in the first petition for post-conviction relief Bell filed in connection with this conviction. *See* Ariz. R. Crim. P. 32.2(a)(2). That the trial court did not cite *Apprendi* in its August 2005 order does not mean the court did not consider it. Indeed, the court's citation in its minute entry to *Febles*, decided the preceding month, suggests it did address the *Apprendi*-based issue. In his petition for review to this court in that post-conviction proceeding, Bell failed to persuade us the trial court had abused its discretion in that proceeding, and we denied relief. *Bell*, No. 2 CA-CR 2006-0062-PR. And, as we noted above, Bell did not ask the supreme court to review our decision.

¶6 We grant Bell's petition for review. But, because Bell has not sustained his burden of establishing the trial court abused its discretion in summarily dismissing his third petition for post-conviction relief, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge